H-7(5)

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Memo. by Edward Newbery, Esquire, Assistant to Inspector General of Police.

Dated 13*th September* 1870.

The point referred by Captain Harris is, "If an officer in charge of a police station summon a European as a witness in a police enquiry, under the provisions of Section 144 Criminal Procedure Code, but the man refuses to attend, how is the offender to be dealt with?"

The non-attendance to the order in writing is a contempt within the meaning of Section 174, Indian Penal Code.

Section 165, Criminal Procedure Code, enacts, "When any such offence as is described in Chapter X of the Indian Penal Code, except Sections 175, 178, 179 and 180, is committed in contempt of the lawful authority of any Civil, Criminal or Revenue Court, by a European British subject, such offence shall be cognizable only by a Magistrate who is a Justice of the Peace, and such Magistrate shall have the same powers of punishment for such offence as are vested by the Statute 53, George III, C. 155, Section 105, in a Justice of the Peace for the punishment of an assault * * *"

This Section does not touch the case of an act of disobedience to the written order of a police officer, or of the summons of a District Superintendent issued as a Magistrate, as the definition of a "Criminal Court" does not include a District Superintendent, who has neither power to try nor to commit.

As jurisdiction in the case involved in this reference is not given in this Section, it becomes necessary to enquire whether jurisdiction is given by any other law.

Act XXXII of 1838, gives to one Justice of the Peace all the powers which, on the 10th December 1838, may have been exercised, by any law in force, by two Justices. It is very difficult to determine with any precision what powers are really conveyed by this Act. Mr. Campbell (Judicial Commissioner of Oudh) considered that this Act gave to Indian Justices of the Peace the same jurisdiction as is exercised by English Courts of Petty Session (page 42 of Atkinson's Criminal Procedure Code). I cannot find the authority for this dictum. 33 George III, Cap. 155, Section 105, with Act VII of 1853, and Section 42 of the Criminal Procedure Code, give Justices of the Peace, being Magistrates with full powers, jurisdiction to try European British subjects accused, by any person whatever, of assault, forcible entry, or other injury

accompanied with force, not being a felony. Act XVIII of 1859, as amended by Act XXII of 1870, gives the High Court jurisdiction to try European British subjects for all acts made punishable upon conviction by a Magistrate by any Act heretofore or hereafter passed by the Governor General in Council, provided the European British subject is not by the Act offended against, declared punishable by some other tribunal. In other words, the Act gives the High Court jurisdiction over European British subjects in all offences where other jurisdiction is not specially provided. Special jurisdiction is given to Justices of the Peace in numerous Special and Local Laws, and, amongst these, by Sections 163 and 165, Criminal Procedure Code, over certain offences under the Penal Code, which are made punishable under the Statute.

Act XXII of 1870, Section 2, enacts that, "unless there be something repugnant in the context, all Acts heretofore or hereafter passed by the Governor General in Council, which confer summary jurisdiction over offences, shall be deemed to apply to European British subjects, although such persons be not expressly referred to therein." The Penal Code, though it creates offences, confers no jurisdiction,—this is done by the Code of Criminal Procedure; and, in the discussion in Council on Act XXII of 1870, it was distinctly affirmed that its provisions in no way affected the Code of Criminal Procedure. Act XXII of 1870 does not therefore give jurisdiction in the case in point.

Act XXXII of 1838 does not give jurisdiction either, as it was decided in 1848, in the Supreme Court of Calcutta, that a Justice of the Peace acted wholly without jurisdiction in trying a case of contempt of process (*Gasper* v. *Mytton*, 3 Morley's Digest, 202.) In the *Queen* v. *Dixon*, where a Magistrate acting as Justice of the Peace had convicted a European British subject of causing hurt under Section 353, Indian Penal Code, it was objected, on two decisions of the Sadr Court of Bombay (pages 191, 223 and 395, Sadr Foujdari Adalat Reports for 1862), that a Justice of the Peace had no authority to try a European British subject under the Penal Code. Couch, C. J., gave the following judgment:—"The two decisions of the Sadr Court quoted were passed after the Code of Criminal Procedure had come into operation, and in the last case, two Judges (Forbes and Newton, JJ.) held that the accused could not be tried under the Penal Code. According to my recollection, that decision has been followed in this Court, and there is no reason for thinking that it is not a right one. I therefore concur in it. A Magistrate being a Justice of the Peace can try a British born subject only under 53 George III, C. 155,

Section 105, and Act VII of 1853, but under them he has no power to award, as is done in this case, imprisonment in default of payment of the fine inflicted." —6 Bom. H. C. R., Cr. Cases 14. It seems clear that, apart from the jurisdiction given to Justices of the Peace by Sections 163 and 165 of the Criminal Procedure Code, they have no power to try European British subjects for offences against the Indian Penal Code. And from the case of *Gasper* v. *Mytton*, above quoted, it is certain that a contempt of process could not be tried by a Justice of the Peace by virtue of the Act of 1838.

It follows then, that though the contempt of the Inspector's process is a smaller offence than a contempt of the process of a Criminal Court, yet it, as well as a contempt of the process of a District Superintendent of Police, can only be taken cognizance of, where the offender is a European British subject, by the High Court.

In the particular case referred by Captain Harris, the contempt of the Inspector's process could have been entertained without the sanction of the Inspector's official superior. The provisions of Section 168, Criminal Procedure Code, read with the decision of the Chief Court in the *Queen* v. *Mahomed Buksh* (1 *Record Cr. J.* 3) render a Deputy Inspector incompetent to sanction a prosecution, but it has been decided by the High Court, Calcutta, that an Inspector is not an inferior ministerial servant, and is competent to sanction prosecutions (*Queen* v. *Ram Gholam Sing*, 11 S. W. R. Cr. R. 22.)

There is one more point involved in the present papers, and one of considerable importance. The Magistrate of * * * states that European British subjects may be committed for neglecting to attend to an order in writing, but that he should not consider it advisable to commit them. It does not affect the legal question, whether the non-attendance frustrated an enquiry into an accident or a murder, and perhaps led to the easy defeat of justice.

It was held by the Calcutta High Court, in *Dullar Bewas Bhuban Shaha*, that a Magistrate could not dismiss a complaint under the provisions of Section 180 of the Criminal Procedure Code, without formally recording the examination of the complainant, under Section 66, Criminal Procedure Code,—3 *Bengal Law R. Appl. Cr.* 53.

In the *Queen* v. *Srinath Mookopadhia*, the same Court held that a Magistrate cannot decide the case of a prosecutor without examining his witnesses. 7 *Sutherland's Weekly Reporter Cr. R.* 45. Similar rulings were given in

Queen v. *Harrah Chand Nowlaka*, and others. 8 *S. W. R. Cr. R.* 12; *Denanath Gopee* v. *Saroda Mookopadhia* and others. 7 *S. W. R. Cr. R.* 47. In the *Queen* v. *Nubas Mahton* it was held that if a complaint is duly made before a Magistrate, and the act imputed appears to amount to an offence, and there is *primâ facie* reason to suppose the accusation true, the Magistrate is bound to proceed, though he may consider a Civil suit more applicable. 8 *S. W. R. Cr. R.* 65. In a criminal letter published at page 12 of 8 *S. W.* R., the Calcutta High Court instructed officers that " when the evidence is evenly balanced between the prosecution and defence, and the Magistrate is in doubt, he is bound to commit."

From these decisions it seems clear that when a complaint is laid of an offences and is substantiated, the Magistrate is bound to take cognizance of it in the manner provided by law. Were it otherwise, it would be open to any Magistrate who doubted the policy of a law, to refuse to give effect to it. It cannot be supposed that a Magistrate is at liberty to enforce only such laws as he chooses, and on the authority of the rulings I have quoted, I consider the refusal of the Magistrate of * * * to commit was illegal.

Opinion by H. M. Plowden, Esquire, Officiating Government Advocate Punjab.

The first question raised by Captain Harris is how to enforce obedience to a summons issued by an Inspector of Police under Section 144, Criminal Procedure Code, to a European British subject.

There is no method of enforcing obedience provided by the Procedure Code; and though the person summoned is bound to attend, the only sanction of the obligation is a penal one.

The second question is—How to punish a European British subject for non-compliance with an order issued under Section 144?

Such non-compliance is an offence under Section 174 of the Indian Penal Code, and the proper course is for the Inspector, with the sanction of his official superior, or for the official superior himself (Section 168, Criminal Procedure Code) to lay a complaint before a Justice of the Peace under Section 174 of the Indian Penal Code. As Section 165, Criminal Procedure Code, is not

* *Mr. Plowden's attention was not drawn to Queen* v. *Ram Gholam Sing.*

applicable to an offence under Section 174, Indian Penal Code, in contempt of the lawful authority of an Inspector of Police (who is neither a Civil, Criminal or Revenue Court) the Justice of the Peace has no summary jurisdiction over the offence under that Section, nor is such jurisdiction created by any other Statute or Act. The Justice of Peace's only course is to discharge the accused, or to send him for trial by a High Court, according to the evidence produced before him.

In the present instance, the jurisdiction to try appertains to the High Court at Allahabad, and not to the Chief Court of the Punjab.